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Frederick Fishman

SOME STATUS FACTORS AFFECTING AVAILABILITY OF PUBLIC LANDS FOR GENERAL LOCATIONS

BY FREDERICK FISHMAN

Frederick Fishman received his LL.B. degree, with highest honors in 1941, and his LL.M. degree in 1942, both from Suffolk University School of Law. He is a member of the bars of the Supreme Court of the United States, of Colorado and of Massachusetts. From 1946 to 1954 he served as Adjudicator in the Washington office of the United States Bureau of Land Management, and from 1954 to June 1957 he served as Supervisory Adjudicator in the Colorado Land Office of the Bureau. He has just been transferred to Washington as an adjudicator in the Appeals Office of the Bureau of Land Management.

It is axiomatic that a person desiring to make a mining location should examine the tract and plat books of the appropriate land office of the Bureau of Land Management to ascertain the availability of the land for such purpose and should also examine the records of the county recorder to determine whether any other person is claiming the land. Similarly, an attorney's title opinion of a mining claim which has not taken into consideration the records of the Bureau of Land Management and the status of the land as of the time the claim was located is without a proper foundation, and often may be misleading.

One of the problems—if not the major one—confronting a person checking the land office records, is the significance of the presence of certain notations and their effect on the availability of the land. In the main, there are three major groups of factors which may preclude appropriation of the land under the federal mining laws: (1) withdrawals, (2) surface disposals, and (3) value of the lands for leasable minerals (either real or prospective by virtue of being included in a mineral lease, permit or application therefor). This paper will not attempt to set out all possible status situations precluding mineral location, but will attempt to cover what the writer considers to be the highlights.

In seeking to determine the effect of a particular withdrawal upon the availability of land to appropriation under the mining laws of the United States, one should determine (a) under what authority the withdrawal was made, and (b) the purpose of the withdrawal, i. e., the contemplated use of the land withdrawn. Moreover, a withdrawal may be clothed in other garments. For example, under a regulation[1] adopted January 10, 1955 a small tract classification is effective as of the time it is noted on the land office tract and plat books to preclude any other appropriation of the land, including those under the federal mining laws, except as provided in the order of classification or in any modification or revision thereof. Similarly, by virtue of a regulation[2] adopted September 3,

[1] 43 C.F.R. 257.3 (Supp. 1957) (filed Jan. 14, 1955, 8:45 a.m.).
[2] 43 C.F.R. 254.6 (1954) (filed Sept. 10, 1954, 8:47 a.m.).

1954, a classification of land for recreational or public purposes under the act of June 14, 1926[3] as amended in 1954[4] will remove the land during the pendency of the classification, from the operation of the United States mining laws except as provided in the order of classification or in any modification or revision thereof. Moreover, in *United States v. Foster*,[5] the Director, Bureau of Land Management, ruled that where a small tract offer is filed with the appropriate land office and the land is subsequently classified for small tract purposes, the classification order relates back to the time of the small tract offer and cuts out any intervening appropriation of the land, including that under the mining laws.

The *Foster* decision raises certain questions which are not easily resolved. In *Edwards v. Brockbank*[6] the Department of the Interior recognized that under sections 5(a) and 7 of the Federal Register Act[7] orders of restoration (and presumably of withdrawal) were not "valid as against any person who has not had actual knowledge thereof until copies of the document have been filed with the Federal Register and made available for public inspection."[8] The Foster decision treats the filing of a small tract application when followed by small tract classification of the land as an actual withdrawal of the land.

Not uncommonly, an application for withdrawal has the force and effect of a withdrawal during the pendency of the application. Under the regulations[9] an application for a withdrawal, made under Executive Order No. 10355,[10] when noted on the serial register and official plat and tract books in the appropriate land office, temporarily segregates such lands from settlement, location, sale, selection, entry, lease, and other forms of disposal under the public land laws, including the mining and the mineral leasing laws, to the extent that the withdrawal or reservation applied for, if effected, would prevent such form of disposal.

The aforementioned withdrawals and applications therefor stem from authority delegated to the Secretary of the Interior from the President, under Executive Order 10355. However, the Reclamation Act of 1902,[11] vests directly in the Secretary of the Interior the authority to make withdrawals for reclamation purposes. What then, is the effect of posting on the land office records an application for withdrawal for reclamation purposes? The Solicitor has held that such an application does not have any segregative effect

[3] 44 Stat. 741 (1926).
[4] 68 Stat. 173 (1954), 43 U.S.C. § 869 (Supp. 1956).
[5] Contests 2474, 2475 (1956). The Director stated in part as follows: "The contestees have not established that prior to the classification of the lands on October 2, 1953, the sand and gravel deposits within each location had market value which was essential to validate each and to prevent the withdrawal of the lands made by the classification order from attaching. Therefore, each of the locations is invalid because not perfected by a valid discovery made prior to the classification (Cameron v. United States, 252 U.S. 450, 456; Wilmot D. Everett, decided October 17, 1955, A-27010 Supp., unreported; United States v. Clyde W. Riggle, decided July 11, 1955, A-27184, unreported). Furthermore, in my opinion, each of the locations is invalid for the reason that under the doctrine of relation which is generally applied to filings under the public land laws, the classification order related back to the dates of filing of the small tract applications thus precluding the attaching of any intervening rights to the same tracts by others through mining locations not perfected by valid discoveries made prior to the dates of filing of the applications." *Id.* at 26.
[6] A-25960 (1951).
[7] 49 Stat. 501-02 (1935), 44 U.S.C. §§ 305 (a), 307 (1952).
[8] *Id.* § 7, 44 U.S.C. § 307 (1952).
[9] 43 C.F.R. 295.9 (1954).
[10] 3 C.F.R. 77 (Supp. 1952).
[11] 32 Stat. 388 (1902), 43 U.S.C. § 416 (1952).

in that a reclamation withdrawal does not become effective[12] to preclude the appropriation of the land as to persons not having actual knowledge of the withdrawal until copies of the document have been filed with the Federal Register and made available for public inspection in accordance with law.[13] First form reclamation withdrawals under the Act of June 17, 1902[14] preclude mining locations.[15] However, the Secretary of the Interior may, under another statute [16] and regulations[17] open such lands to location under such terms as he may deem appropriate. Lands withdrawn under the second form of reclamation are not thereby precluded from mineral appropriation.

In the instructions of June 6, 1905,[18] first form withdrawals embrace lands which

> "may possibly be needed in the construction and maintenance of irrigation works, and other commonly known as 'withdrawals under the second form' which embraces lands not supposed to be needed in the actual construction and maintenance of irrigation works, but which may possibly be irrigated from such works."

As a practical matter, all reclamation withdrawals within the past twenty years have been made under the first form.

Withdrawals for power site purposes made prior to the act of June 25, 1910[19] were effective to preclude mining locations on the land.[20] The 1910 act stated in part that lands withdrawn under its provisions "shall at all times be open to exploration, discovery, occupation and purchase under the mining laws of the United States, so far as the same apply to minerals other than coal, oil, gas and phosphates." By the act of August 24, 1912,[21] "metalliferous minerals" were substituted for the named minerals. During the period from August 24, 1912, to the enactment of section 24 of the Federal Power Act of 1920,[22] power-site reserves established under

[12] See Solicitor's Op. M-36382, *Effective Date of Orders Withdrawing Public Lands for Reclamation Purposes*, October 24, 1956.
[13] 49 Stat. 502 (1935), 44 U.S.C. § 307 (1952).
[14] See note 11 *supra*.
[15] Harry A. Schultz, A-26794 (1953); United States v. Dawson, 58 I.D. 670 (1944).
[16] 47 Stat. 136 (1932), 43 U.S.C. § 154 (1952).
[17] 43 C.F.R. 185.36 (1954).
[18] 33 L.D. 607 (1905).
[19] 36 Stat. 847 (1910), 43 U.S.C. § 141 (1952).
[20] See United States v. Midwest Oil Co., 236 U.S. 459 (1941).
[21] 37 Stat. 497 (1912), 43 U.S.C. § 142 (1952).
[22] 41 Stat. 1075 (1920), 16 U.S.C. § 818 (1952).

the 1910 act as amended by the 1912 act were not thereoby closed to metalliferous mining locations. However, non-metalliferous locations made after the 1912 act and prior to June 10, 1920, may be permitted to go to patent if the patent applicant consents,[23] to take the patent subject to section 24 of the Federal Power Act, in accordance with the proviso to that section.[24]

From June 10, 1920 until August 11, 1955, mining locations made on power site lands, for which the withdrawals were made during that period were null and void.[25] It should be noted that in that case it was held that if under applicable law[26] the parties remain in possession for a period equivalent to the state statute of limitations, absent adverse claims, and have made a discovery after the restoration of the land, such action would be sufficient to permit a patent to issue, all else being regular.

The Mining Claims Restoration Act of 1955[27] removed in the main, power site reserves as a bar to mining, except for lands (1) which are included in any project operating, or being constructed under a license or permit issued under the Federal Power Act or other act of Congress, or (2) which are under examination or survey by a prospective licensee of the Federal Power Commission, if such prospective licensee holds an uncancelled permit issued under the Federal Power Act authorizing him to make preliminary examination or survey and such permit in the case of a prospective licensee has not been renewed more than once. Although a negligible percentage of power site lands fall within either excepted category, the cautious title examiner will undoubtedly check with the Federal Power Commission to determine whether either of the exceptions applies to the land in which he is interested. The legislative history of the act[28] makes manifest the Congressional intention not to validate claims which were located at a time when the land was withdrawn from entry, but rather to permit new locations, or relocations, on such power site lands, absent other prohibiting factors.

Section 4[29] of this 1955 statute contemplates in part that the owner of any unpatented mining claim, located after the date of the act, shall file for record in the appropriate land office (1) within sixty days of the date of location, a copy of the notice of the location of the claim, and (2) within sixty days after the expiration of any assessment year a statement as to the assessment work done or improvements made during the previous assessment year. What are the consequences of non-compliance with these provisions? It would appear that failure to timely file a copy of the location notice with

[23] In effect by such consent, the patentee agrees that the United States, its permittees, and licensees may enter upon, occupy and use any part of the land for power purposes and that no claim or right to compensation shall accrue to the owner of the land from the occupation or use of any such lands for power purposes.
[24] Walter W. Hall, 50 L.D. 656 (1924).
[25] Harry A. Schultz, 61 L.D. 259 (1953), citing Coeur D'Alene Crescent Mining Co., 53 L.D. 531, 537 (1937).
[26] Rev. Stat. § 2332 (1875), 30 U.S.C. § 28 (1952).
[27] 69 Stat. 682, 30 U.S.C. § 621-25 (Supp. 1956).
[28] H.R. Rep. No. 86, 84th Cong., 1st Sess. (1955).
[29] 69 Stat. 683, 30 U.S.C. § 623 (Supp. 1956.)

the land office may render the claim invalid. The situation could probably be cured by making a relocation and then filing timely.

The separation of the mineral estate from the surface by the patenting of the surface should put the careful title examiner to further study of the problem. It is true that section 9 of the Stock-Raising Act of 1916[30] creates a separate mineral estate, but it specifically provides in part as follows:

> "All entries made and patents issued under the provisions of this division of this chapter shall be subject to and contain a reservation to the United States of all the coal and other minerals in the lands so entered and patented, together with the right to prospct for, mine, and remove the same. The coal and other mineral deposits in such lands shall be subject to disposal by the United States in accordance with the provisions of the coal and mineral land laws in force at the time of such disposal."

Similarly, under Section 8 of the Taylor Grazing Act,[31] where the United States gives a patent to the surface and retains the minerals, the minerals are not thereby removed from the mineral loction laws.[32] Rather, the minerals in the lands received by the United States, if any are received, do not become available to mineral location until an order of restoration so makes them. Generally speaking, where minerals only are restored, they become available on the thirty-fifth day after the date of the restoration order. Where land and minerals are both involved, the minerals do not become subject to location until the 126th day after the date of the order.

Under various special acts of Congress, the surface of lands has been granted to governmental bodies for public purposes and to divers charitable organizations with all minerals being reserved to the United States. The specific statutes[33] do not in terms make the minerals subject to location. In considering the question of whether such minerals are subject to location, the Department of the Interior held that where a patent contains a reservation of all minerals under a law providing for such a reservation but containing no authorization for the disposal of the minerals, mining claims cannot be located since the United States mining laws apply only to minerals *in lands belonging to the United States.*[34]

Mining locations cannot be made on lands included in small tract leases, since, although the Small Tract Act, of 1938[35] contemplates a reservation of all minerals to the United States, it also provides that such minerals will be subject to disposition under such laws as the Secretary of the Interior may prescribe. No such reg-

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[30] 39 Stat. 864 (1916), as amended, 42 Stat. 208 (1921), 43 Stat. 1145 (1925), and 60 Stat. 1100 (1946), 43 U.S.C. § 299 (1952).

[31] 48 Stat. 1272 (1934), as amended, 62 Stat. 533 (1948), 43 U.S.C. § 315g (1952).

[32] Sec. 8(d) of the Taylor Grazing Act. This provides in applicable portion as follows: "Where mineral reservations are made by the grantor in lands conveyed by the United States, it shall be so stipulated in the patent, and any person who prospects for or acquires the right to mine and remove the reserved mineral deposits may enter and occupy so much of the surface as may be required for all purposes incident to the prospecting for, mining and removal of the minerals therefrom, and may mine and remove such minerals, upon payment to the owner of the surface for damages caused to the land and improvements thereon."

[33] E.g., A grant to the City and County of Denver, 38 Stat. 706 (1941).

[34] M-36279 (1955).

[35] 52 Stat. 609 (1939), as amended, 68 Stat. 240 (1954), 43 U.S.C. § 682 (Supp. 1956).

ulations have been prescribed and such minerals are not subject to location.[36]

Similarly, the existence of an airport lease precludes the making of a valid mineral location on the lands covered thereby.[37] Moreover, the filing of an airport lease application under the act of May 24, 1928,[38] operates as a segregation of the lands described therein from the time such lease application is filed in the proper land office.

However, the existence of a grazing permit, license, or lease does not preclude or restrict prospecting, locating, developing, mining, or patenting the mineral resources under laws applicable thereto.[39]

Land within a subsisting homestead entry is subject to mineral location if the locator makes peaceable entry thereon.[40] In *United States v. Schaub*,[41] it was held that a special use permit issued by a Regional Forester on national forest lands reserving land for use of the Bureau of Public Roads as a source of road building material under section 17 of the Federal Highway Act[42] and the act of March 30, 1948,[43] was sufficient to be a valid withdrawal and appropriation of the land and to render it closed to entry or location under the mining laws. The court held in this case that as the United States had already made an appropriation of the minerals involved, the land was not open to another mineral location.

Generally speaking, lands purchased by the United States are not public lands and therefore are not subject to mineral location. In *Rawson* v. *United States*,[44] it was held that patented lands, which have been reacquired by the United States, are not by the mere force of the reacquisition restored to the public domain but, in the absence of legislation or authoritative directions to the contrary, remain in the class of lands acquired for special uses, such as parks, national monuments, and the like, and as such, could not rationally be claimed to remain open to location under the mining laws. The lands in issue in that case had presumably been purchased under the Bankhead-Jones Farm Tenant Act.[45] The court further held that the placing of such patented lands under the jurisdiction of the Secretary of Agriculture refuted any notion that the lands were subject to the general mining laws.

The Department has uniformly held that, after the passage of the Mineral Leasing Act of February 25, 1920,[46] and until the effective periods embodied in the acts of August 12, 1953[47] and of August 13, 1954,[48] there could be no room for the contemporaneous operation of the mining laws and the Mineral Leasing Act with respect to the same lands and that if an attempt were made, after the

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[36] See 43 C.F.R. 257.15 (1954) and Departmental decision of August 15, 1947, A-24669, unreported.
[37] Albert Lindemuth, A-26429 (1952).
[38] 45 Stat. 728 (1928), as amended, 55 Stat. 621 (1941), 49 U.S.C. § 211-14 (1952).
[39] See § 6 of the Taylor Grazing Act, 48 Stat. 1272 (1934), 43 U.S.C. § 315g (1952).
[40] See James W. Bell, 52 L.D. 197 (1927); Union Oil Co., A-26518 (1953).
[41] 103 F. Supp. 873 (D. Alaska 1952). See also Sam D. Rawson, A-26800 (1953).
[42] 42 Stat. 216 (1921), as amended, 63 Stat. 1070 (1949), 23 U.S.C. § 18 (1952).
[43] 62 Stat. 100 (1948), 48 U.S.C. § 341 (1952).
[44] 225 F.2d 855 (9th Cir.), *cert. denied*, 350 U.S. 934 (1955).
[45] 50 Stat. 522 (1937), 7 U.S.C. §§ 1001-05(d), 1007-29 (1952).
[46] 41 Stat. 437, as amended, 30 U.S.C. §§ 181-287 (1952).
[47] 67 Stat. 539, 30 U.S.C. §§ 501-05 (Supp. 1956).
[48] 68 Stat. 708, 30 U.S.C. §§ 521-31 (Supp. 1956).

enactment of the Mineral Leasing Act, to locate a mining claim on land covered by an outstanding permit or lease issued under that act, the Department would not recognize the attempted location. The Department has also held that the filing of an allowable application for a noncompetitive oil and gas lease has a segregative effect on the land applied for and confers upon the applicant a priority of right over any adverse interest thereafter sought to be initiated.[49]

By act of August 12, 1953,[50] Congress provided, among other things, that any mining claim located under the mining laws of the United States subsequent to July 31, 1939, and prior to January 1, 1953, on lands of the United States which were at the time of such location included in a lease issued under the Mineral Leasing Act or covered by an application for such a lease should be effective to the same extent as if such mining claim had been located on lands which were at the time of such location subject to location under the mining laws of the United States. The act required, however, that in order to obtain its benefits the owner of any such mining claim must, not later than 120 days after August 12, 1953, post on such claim and file for record in the office where the notice of location of such claim was of record an amended notice of location of such claim, stating that such notice was filed pursuant to the provisions of the act and for the purpose of obtaining its benefits. The act

[49] See Jebson v. Spencer, 61 I.D. 161 (1953) (and cases there cited); Monolith Portland Cement Company, 61 I.D. 43 (1952); United States v. U. S. Borax Co., 58 I.D. 426 (1943); Filtrol v. Brittan and Echart, 51 L.D. 649 (1926); Clear Gravel Enterprises, Inc., A-27287 (1956).

[50] See note 47 *supra*.

provided further that any mining claims given force and effect under the act shall be under certain conditions subject to the reservation to the United States of all minerals subject to disposition under the Mineral Leasing Act.

On August 13, 1954, Congress passed another act,[51] under the terms of which mining claims may, thereafter, be located on lands of the United States which are at the time of location included in leases issued under the Mineral Leasing Act or covered by applications for leases under that act. The act of August 13, 1954, further repeated the substance of the act of August 12, 1953, and provided that in order to be entitled to the benefits thereof the owners of the mining claims located on such lands subsequent to July 31, 1939, and prior to January 1, 1953, must have posted on the claims and filed for record within the time allowed by the act of August 12, 1953, amended notices of location, stating that such notices were filed pursuant to the provisions of the 1953 act and for the purpose of obtaining the benefits thereof.

As previously indicated, under the act of August 13, 1954,[52] holders of mining claims on lands[53] located after December 31, 1952, and prior to February 10, 1954, must not later than 120 days after the date of the act (December 11, 1954), post on the claim and file in the recorder's office an amended notice of location stating that such notice is filed pursuant to that act and for the purpose of obtaining the benefits of that act.

Section 5 of the act of August 13, 1954,[54] removes the disability after August 13, 1954, of lands being unavailable for mineral location by virtue of their actual or prospective value for leasable minerals. However, the owner of any claim validated under the acts of August 12, 1953, or August 13, 1954, in effect waives the right to all leasable minerals when patent issues, if at the time of issuance of patent the lands have presumptive or actual value for any leasable mineral.[55]

The status of claims located on lands having actual or presumptive value for leaseable minerals at the time of location and which were located between February 10, 1954, and August 13, 1954, is not entirely clear. It would appear that such claims would be considered as void *ab initio* and could not be validated. However, they could be relocated after August 13, 1954 in accordance with the terms of the act of that date.

Prior to the enactment of the acts of August 12, 1953[56] and August 13, 1954,[57] the mere fact that land was classified as being valuable for a leaseable mineral did not necessarily preclude the land from mining location. The Department held[58] that lands actually classified as coal lands must actually possess value for coal in order to prevent location.

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[51] See note 48 *supra*.
[52] *Ibid.*
[53] This provision is applicable only to those lands which at the time of location were: (a) Included in a lease or permit issued under the mineral leasing laws; or (b) Covered by an application or offer for a permit or lease under the mineral leasing laws; or (c) Known to be valuable for minerals subject to disposition under the mineral leasing laws.
[54] 68 Stat. 710 (1954), 30 U.S.C. § 525 (Supp. 1956).
[55] Note 53 *supra* sets out the criteria for presumptive or actual value.
[56] See note 47 *supra*.
[57] See note 48 *supra*.
[58] John McFayden, 51 L.D. 436 (1926).

In a recent opinion,[59] the Solicitor of the Department, in discussing metalliferous mining locations within a petroleum reserve, held as follows:

> "A petroleum reserve created by a withdrawal made under and pursuant to the provisions of the act of June 25,1910 (36 Stat. 847), as amended by the act of August 24, 1912 (37 Stat. 497; 43 U.S.C. secs. 141, 142), is a temporary withdrawal which, in and of itself, does not prevent the location of mining claims for metalliferous minerals.
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> "Metalliferous mining locations could be made within petroleum reserves prior to the act of Februeary 25, 1920 (41 Stat. 437; 30 U.S.C. sec. 181), even if the land was then known to contain oil or gas. After that enactment and prior to the enactment of the acts of August 12, 1953 (Public Law 250; 67 Stat. 539), and August 13, 1954 (Public Law 585; 68 Stat. 708), lands valuable for oil and gas were not subject to location under the United States mining laws. But only lands known to contain those minerals were excluded from location for metalliferous minerals.
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> "If the creation of a petroleum reserve is tantamount to the classification of the reserved lands as mineral, valuable for oil and gas, the rule applicable to lands classified as valuable for coal and, subsequent to the act of February 25, 1920, *supra,* oil shale would apply to them. That rule is that the locator of a mining claim on lands so classified may defeat the classification by proving, in a proper proceeding, that the land is, in fact, not valuable for the coal, oil shale, or oil and gas, whichever was named in the order classifying the land. Since the petroleum reserve stamps the land as *prima facie* valuable for oil or gas, the burden of proof rests upon the mining claimant."

In effect, the opinion holds that the creation of a petroleum reserve raises a presumption of the value of the land for oil and gas, which presumption may be rebutted in a proper proceeding by a locator showing that the land has in fact no value for oil or gas, the burden of proof resting upon the locator. This writer knows of no prescribed procedure whereby a locator could raise the issue and have it decided, other than by the filing of a mineral patent application. It is true, of course, that the issue might be raised by the Government in a contest proceeding directed against the validity of the claim, in which event the Government could rely on the evidentiary weight of the presumption until sufficient evidence had been adduced to rebut the presumption,[60] in which event the burden of going forward and the ultimate burden of proof would rest with the Government.

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[59] 63 I.D. 346 (1956).

[60] See Sherman Inv. Co. v. United States, 199 F.2d 504 (8th Cir. 1952); Christiansen v. Hilber. 282 Mich. 403, 276 N.W. 495 (1937).